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Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-777

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER UNITED STATES GYPSUM COMPANY

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February 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner United States Gypsum Company ("U.S. Gypsum") respectfully submits this Reply Brief in accordance with Supreme Court Rule 15.6 to address arguments first raised in the Brief in Opposition of the Wesley Theological Seminary of the United Methodist Church ("Wesley").

I. DUE PROCESS CHALLENGES TO THE REVIVAL OF TIME-BARRED CLAIMS ARE NOT GOVERNED BY THE TEST ENUNCIATED IN *USERY v. TURNER ELKHORN MINING CO.*

Wesley urges that the traditional "substantive/procedural" or "right/remedy" distinction, which this Court has applied in *every* case that it has decided involving a

due process challenge to the retroactive revival of time-barred claims, is nothing more than a "red herring" [Brief in Opposition, p. 10] and "a long-abandoned test" [Brief in Opposition, p. 16 n.5]. Instead, Wesley suggests that all retroactive legislation should be tested by three criteria suggested by a law review article written 30 years ago.[1] The test suggested by Wesley has *never* been adopted by this Court or any other federal court to U.S. Gypsum's knowledge. It was certainly not applied by either of the courts below.[2] Indeed, if the constitutional test urged by Wesley is to be adopted, certiorari should be granted for that reason alone.

Wesley attaches some unspecified significance to the fact that the case of *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925) was not mentioned in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) or *Pension Benefit Guaranty Corp. v. R.A. Gray*

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[1] Even Wesley does not defend the Court of Appeals' improper application of the test enunciated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[2] Although it is clear that the Court of Appeals did not purport to apply the three-pronged law review test, Wesley attempts to recast the Court of Appeals' approach in terms of such a test. Indeed, that type of *post hoc* analysis was a problem in the Court of Appeals in this case. Adopting for the first time a mere rationality test for a challenge to the revival of a claim, as to which the right had been extinguished by a substantive statute of repose, the Court of Appeals decided that issue on the *mistaken* belief that "defendant makes no claim of irrationality." [App. 7a]. U.S. Gypsum unquestionably did challenge the rationality of the 1986 amendments. Indeed, the District Court specifically noted this challenge and stated that it did not reach that issue "as it finds that the statute may not be retroactivity applied without effecting a deprivation of due process." [App. 21a n.10]. U.S. Gypsum specifically raised this point in its Petition for Rehearing, but to no avail. Wesley's attempt to have this Court believe that U.S. Gypsum never challenged the rationality of the amendments to the statute of repose [Brief in Opposition, p. 7] is, at a minimum, disingenuous.

& Co., 467 U.S. 717 (1984). [Brief in Opposition, p. 10 n.3]. What is truly significant is that not only *Danzer*, but also the other decisions of this Court that have addressed revival of time-barred claims, *e.g.*, *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), were not cited or discussed in *Turner Elkhorn* or *Gray*. It is equally significant that in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), this Court's most recent decision involving a due process challenge to the revival of a time-barred claim, no mention was made of *Turner Elkhorn* which had been decided earlier that same term.[3] These observations lead to the inevitable conclusion that a different analysis applies to the retroactive revival of time-barred claims than to other types of retroactive economic legislation. For the Court of Appeals to have nevertheless relied on *Turner Elkhorn* and ignored *Danzer* highlights the importance of review by this Court to clarify the constitutional standard applicable to the retroactive abrogation of vested substantive rights conferred by statutes of repose.

II. WHETHER A RIGHT HAS VESTED IS IMPORTANT FOR CLAIMS UNDER THE DUE PROCESS CLAUSE

Wesley suggests that the question of whether a right has vested is not pertinent to a due process challenge to retrospective civil legislation. [Brief in Opposition, pp.

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[3] Wesley's argument that *Danzer* was effectively overruled in *Robbins & Myers* is neither borne out by the *Robbins & Myers* opinion nor by any subsequent decision. To the contrary, in *Robbins & Myers*, this Court recognized the continuing validity of *Danzer* and the continued validity of the right/remedy distinction discussed in *Chase Securities*. 429 U.S. at 243-44. The *Chase Securities* and *Danzer* results were different because in *Chase Securities* "the effect of the legislation was merely to reinstate a lapsed remedy, . . . appellant had acquired no vested right to immunity . . . and . . . reinstatement of the remedy by the state legislature did not infringe any federal right . . . ." 425 U.S. at 312 n. 8.

8-9]. Wesley's suggestion cannot be reconciled with the decisions of this Court. For example, in *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981), this Court recognized that although "a law need not impair a 'vested right' to violate the *ex post facto* prohibition," "[e]valuating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements." The Court further noted that "the concept of vested rights" is elemental to "the test for evaluating retrospective laws in a civil context." 450 U.S. at 29 n. 13.

The Court of Appeals failed to perceive the distinction of constitutional magnitude between a mere expectation and the vesting of a right conferred by affirmative legislative action. [App. 7a-8a]. It is this very distinction which underlies the development of two independent lines of precedent in this Court.

III. WESLEY CITES NEITHER FEDERAL NOR STATE COURT DECISIONS WHICH FOLLOW THE COURT OF APPEALS' UNPRECEDENTED APPLICATION OF THE *TURNER ELKHORN* TEST TO THE REVIVAL OF TIME-BARRED ACTIONS

Wesley argues that the decision of the Court of Appeals comports with the resolution of similar cases by other courts. This argument is both inaccurate and misleading. All of the cases cited by Wesley explicitly employed the right/remedy distinction that Wesley disparages, and none of the cases applied the *Turner Elkhorn* analysis adopted by the Court of Appeals panel here. The question presented in *Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982) was "whether Tennessee's ten-year *statute of limitations* based on sale, adopted July 1, 1978 . . . created for defendant a vested right barring plaintiff's claim despite a July 1, 1977, statutory amendment excluding asbestos-related disease actions." 696 F.2d at 460 (emphasis added). The *Murphree* Court relied on *Chase Securities* and *Campbell*

v. Holt and the concept that *statutes of limitations* go to matters of remedy rather than the destruction of rights. *Id.* at 462.

Similarly, in *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), the court addressed an amendment to a procedural statute of limitations and not a substantive statute of repose. The *Agent Orange* Court relied on *Chase Securities* and the right/remedy distinction in rejecting the due process challenge in that case. In both *In Re: Eastern and Southern Districts Asbestos Litigation*, (E.D.N.Y. 1988) and *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069 (1989), the courts were again addressing the revival of claims which had previously been barred by a *statute of limitations*. In rejecting the federal due process challenges in those cases, the *Hymowitz* court relied exclusively on *Chase Securities*; the court in *In Re: Eastern and Southern Districts Asbestos Litigation* relied upon *Chase Securities* and *Robbins & Myers*.

The most recent decision cited by Wesley is *City of Boston v. Keene Corporaiton*, 406 Mass. 301, 547 N.E.2d 328 (1989), a case expressly decided on the right/remedy and procedure/substance distinction. The *City of Boston* case involved a due process challenge to a statute reviving claims as to which the *statute of limitations* had run. The Court rejected the challenge to that statute noting:

> [T]he defendants' interest in the limitations defense is procedural rather than substantive. We have held that, in cases not involving claims to real property, the running of the applicable limitations period bars only the legal remedy, while leaving the underlying cause of action unaffected. * * * Consequently, the running of the limitations period on such claims does not create a vested right which cannot constitutionally be taken away by subsequent statutory revival of the barred remedy.

547 N.E.2d at 335.

The continued validity of the right/remedy and substance/procedure distinction as a critical factor in the analysis of due process challenges to statutes reviving time-barred claims is demonstrated in both the cases cited by U.S. Gypsum and those cited by Wesley. These cases make it clear that different results obtain where the statutory time bar has extinguished the claim or conferred immunity (*i.e.*, statutes of repose) rather than barred the remedy (statutes of limitations). The holding and the analysis of the Court of Appeals are anomalous and inconsistent with this Court's precedents. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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